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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JASON EDWARD THOMAS CARDIFF,

Defendant.

No. 5:23-CR-00021-JGB

**GOVERNMENT'S OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS
COUNTS 3 AND 4 OF THE INDICTMENT**

Date: January 13, 2025
Time: 2:00 p.m.
Courtroom: 1

Plaintiff United States of America, by and through its counsel of record, the Consumer Protection Branch of the United States Department of Justice and Trial Attorney Manu J. Sebastian, and the United States Attorney for the Central District of California and

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant's Motion to Dismiss Counts 3 and 4 of the Indictment should be denied because it does not raise an issue that is properly heard under Rule 12(b) of the Federal Rules of Criminal Procedure. The Indictment in this case properly charges Defendant with two counts of witness tampering, in violation of 18 U.S.C. § 1512(b)(2)(B). Although Defendant states that his motion is based on a defect in the indictment and the failure to state an offense, he fails to establish that the indictment does not meet the requirements of Fed. R. Crim. P. 7 or that the allegations in the indictment do not state an offense. Instead, Defendant raises a factual dispute about whether Defendant's obstructive conduct had a nexus to an official proceeding. That determination is properly decided by the jury at trial. A Rule 12(b) motion to dismiss is not a proper way to raise a factual defense. United States v. Nukida, 8F.3d 665, 669 (9th Cir. 1993) (cleaned up).

Even if the Court decides to consider Defendant's claim at this stage, the Indictment clearly points to proceedings that the jury may decide are official proceedings for purposes of the tampering statute. The Indictment alleges that Defendant corruptly persuaded two individuals to destroy documents "with the intent to impair the integrity and availability of the objects for use in official proceedings, namely civil and administrative proceedings before the United States District Court for the Central District of California and the United States Federal Trade Commission." As explained below, Defendant's company received a civil investigative demand (CID), which is an official proceeding before the FTC. When his company did

1 not comply, the FTC filed an enforcement action in this Court to
2 force his company to comply, which is also an official proceeding.
3 While the enforcement action was pending, Defendant engaged in the
4 criminal conduct alleged in Counts 3 and 4. The FTC then sued
5 Defendant in this Court, another official proceeding that was
6 foreseeable to Defendant when he received the FTC's CID.

7 Defendant focuses solely on the lawsuit the FTC filed against
8 him, ignoring that both the CID and the FTC's enforcement proceeding
9 are official proceedings. But Defendant's argument contradicts his
10 own admission on the second page of the motion that there were
11 "proceedings filed by the [Federal Trade Commission] to compel
12 compliance with the [civil investigative demand]." Def. Mot. at 2:7-
13 8. He also completely disregards the fact that his timeline of events
14 references the docket entries of the enforcement action, an official
15 proceeding in this Court. Id. at 4-5.

16 Importantly, Defendant neglects to include in his timeline that
17 he stipulated to an order compelling production of documents related
18 to the CID within this official court proceeding, was compelled by
19 Judge Otero to produce such documents, and subsequently instructed
20 his staff to withhold and destroy those same documents that were the
21 subject of the order to compel rather than producing them as the
22 Court ordered him to. See Federal Trade Commission v. Redwood
23 Scientific Technologies, Case No. 2:17-cv-07921 (C.D. Ca.).

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26 /

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1 **II. STATEMENT OF FACTS**

2 On August 8, 2017, the Federal Trade Commission ("FTC") issued a
3 Civil Investigative Demand ("CID"), signed by FTC Commissioner
4 Terrell McSweeney, one of five FTC Commissioners nominated by the
5 President and confirmed by the Senate, to Defendant's company,
6 Redwood Scientific Technologies, Inc. ("Redwood"), directed to the
7 attention of Defendant, "Jason Cardiff, President and Chief Executive
8 Officer." Def. Mot. Ex. 1-1. This 18-page compulsory legal demand
9 listed the FTC Matter as No. 1723117 and required Redwood to respond
10 by September 6, 2017, with, among other things, answers to
11 interrogatories and documents responsive to the requests contained
12 therein. Id. Defendant's company, however, failed to comply with the
13 CID.

14 On October 30, 2017, the FTC filed a Petition For an Order
15 Enforcing Civil Investigative Demand in the United States District
16 Court for the Central District of California. FTC v. Redwood, Case
17 No. 2:17-cv-07921 (C.D. Ca.), Dkt. 1 ("hereinafter FTC v. Redwood").
18 The FTC also filed a Memorandum of Points and Authorities to support
19 the petition. Id. at Dkt. 2.

20 On November 1, 2017, the case was assigned to District Judge
21 Percy Anderson and Magistrate Judge Alicia G. Rosenberg. Id. at Dkt.
22 6. On November 21, 2017, the case was transferred to Judge S. James
23 Otero and Magistrate Judge Paul L. Abrams, as it was related to
24 another case against Redwood, Massachusetts Medical Society v.
25 Redwood Scientific Technologies Corporation, Case No. 2:17-cv-0338-
26 SJO-PLA, (C.D. Ca). Id. at Dkt. 8. On November 27, 2017, Judge Otero
27 entered an Initial Standing Order providing the parties with
28 information on the case and the rules that govern it. Id. at Dkt. 9-

1 10.

2 On January 16, 2018, Judge Otero entered an Order to Show Cause
3 setting a hearing date for January 29, 2018. Id. at Dkt. 12. The
4 relevant documents (including the initial standing order) were served
5 on Green, the attorney for Defendant's company, who had been
6 communicating with the FTC since the issuance of the CID. Id. at Dkt.
7 13.

8 On January 24, 2018, Defendant's company, along with the FTC,
9 filed a stipulation for an order to compel compliance with the CID
10 and vacating the show cause hearing. Id. at Dkt. 16.

11 On January 25, 2018, pursuant to the parties' stipulation, Judge
12 Otero entered an Order Compelling Compliance with Civil Investigative
13 Demand and Vacating Hearing. Id. at Dkt. 17. This order required
14 Redwood to produce material responsive to the CID by February 9,
15 2018. Id.

16 Defendant's company again failed to produce documents. On
17 February 26, 2018, the FTC filed a status report informing the court
18 of such and on March 5, 2018, the FTC filed an application for an
19 order to show cause why Redwood should not be held in contempt. Id.
20 at Dkt. 18-19.

21 On March 6, 2018, Judge Otero issued another Order to Show Cause
22 directing Redwood to show cause as to why it should not be held in
23 contempt and setting a hearing date of April 9, 2018. Id. at Dkt. 20.
24 The relevant documentation was served on Green shortly thereafter.
25 Id. at Dkt. 21. On March 20, 2018, another Order to Show Cause was
26 entered by Judge Otero moving the hearing date to April 23, 2018. Id.
27 at Dkt. 22. The relevant documentation was served on Green by email.
28 Defendant was also personally served and served by Fed Ex. Id. at

1 Dkt. 23.

2 By April 17, 2018, Defendant's company had only produced a total
3 of 81 documents to the FTC. Id. at Dkt. 24. Only one email exchange
4 was produced to the FTC. Id. The FTC filed a reply in support of
5 their application for an order to show cause informing the Court that
6 the Defendant's company continued to be noncompliant with the CID and
7 the order compelling compliance. Id. On April 23, 2018, the Court
8 held a Show Cause hearing where Green represented to the Court that
9 all of the documents Redwood was compelled to produce would be turned
10 over by May 25, 2018. Id. at Dkt. 25-26. The Court set a new Show
11 Cause hearing for May 29, 2018. Id. at Dkt. 25.

12 On April 27, 2018, the FTC provided a comprehensive 7-page
13 search term list that would assist Redwood in searching Defendant's
14 and his employees' emails for documents responsive to the CID. Id. at
15 Dkt. 26-3. Defendant received that document from Green and forwarded
16 it to Danielle Walker (formerly known as Danielle Cadiz), Redwood's
17 Director of Operations. See Ex. 1, April 27, 2018 Search Term Email.

18 Unbeknownst to the Court and the FTC, while this litigation was
19 occurring over Redwood's compliance with the CID, the Defendant
20 instructed his staff to destroy documents responsive to the CID and
21 impede the ongoing court proceeding and the FTC's investigation.
22 Defendant emailed his staff on April 30, 2018, instructing them that
23 they were "in the drivers [sic] seat" when it came to the documents
24 the company produced and subsequently instructed his staff to use the
25 search terms provided by the FTC to destroy documents responsive to
26 the CID. See Ex. 2, April 30, 2018 Production Email; see also Ex. 3,
27 Dec'l of Danielle Walker, Redwood Director of Operations, FTC v.
28 Jason Cardiff, No. 5:18-cv-02104-DMG-PLA (C.D. Cal.), Dkt. 424-1 ¶19.

1 On May 22, 2018, the FTC filed another status report with the
2 Court informing it of Redwood's noncompliance. FTC v. Redwood, Dkt.
3 26. During an April 19, 2018 conference call, Green identified other
4 sources of responsive material, including a Google Drive account, a
5 web-based customer relationship management database called
6 "Limelight," 10 individual workstations, and individual Google email
7 accounts. Id. Green also informed the FTC by email on April 22 that
8 Redwood retained Lighthouse eDiscovery to assist in the document
9 production effort. Id. Redwood, however, continued to fail to produce
10 the required documents. Id. The FTC informed the Court that this
11 continued failure to comply with the CID impeded the FTC's official
12 investigation. Id.

13 At the Show Cause hearing on May 29, 2018, Green informed the
14 Court that Redwood would produce the remaining material they were
15 compelled to produce by June 13, 2018. Id. at Dkt. 28. The Court set
16 the next Show Cause Hearing for June 14, 2018. Id.

17 On June 12, 2018, Judge Otero entered an Order requiring Redwood
18 to take additional steps to provide the documents from the additional
19 sources Green previously identified. Id. at Dkt. 29. On June 13,
20 2018, Green filed a request for extra time to comply with the June
21 12th order and Judge Otero denied the request. Id. at Dkt. 30, 32.

22 On July 13, 2018, the FTC filed a status report informing the
23 Court that Defendant's company continued to fail to comply with the
24 previous court orders compelling compliance. Id. at Dkt. 37.

25 On August 2, 2018, the FTC filed another status report informing
26 the Court that Defendant's company had not resolved any of the issues
27 reported in the July 13, 2018 status report and that Redwood
28 continued to fail to comply with the previous court orders compelling

1 compliance. Id. at Dkt. 39.

2 On August 29, 2018, the Court scheduled a status conference for
3 September 10, 2018. Id. at Dkt. 40. Redwood's counsel did not appear
4 on September 10, 2018, and the Court continued the matter to
5 September 11, 2018. Id. at Dkt. 41. Redwood's counsel was unavailable
6 for the September 11, 2018 hearing so the hearing was continued to
7 September 17, 2018. Id. at Dkt. 42-43. After conferring with counsel
8 on September 17, another hearing was then set for October 22, 2018.
9 Id. at Dkt. 43.

10 According to the FTC, following the September 17 hearing,
11 Redwood's counsel provided supplemental responses to the CID's
12 document requests and interrogatory responses on September 24, 2018.
13 Id. at Dkt. 44. Redwood, however, continued to fail to produce
14 "updated information about sales, refunds, and consumer complaints to
15 the date of final and complete production as required by the CID."
16 Id.

17 On October 3, 2018, the FTC filed a sealed Ex Parte Application
18 for a Temporary Restraining Order against the Defendant and his
19 companies in another action before Judge Otero. FTC v. Cardiff, et
20 al., Case No. 5:18-cv-02104 (C.D. Ca.). Dkt. 1. The FTC also filed a
21 sealed Complaint for Permanent Injunction and Other Relief. Id. at
22 Dkt. 2.

23 Finding evidence that Defendant violated the Federal Trade
24 Commission Act ("FTCA"), on October 10, 2018, the Court granted the
25 FTC's request for a Temporary Restraining Order, appointed a
26 Receiver, and permitted the FTC and Receiver "immediate access" to
27 Defendant's business premises. Id. at Dkt. 3. On October 12, 2018,
28 the FTC and Receiver executed the immediate access. Id. at Dkt. 52.

1 That same day, the FTC filed a status report in FTC v. Redwood
2 informing the Court that Redwood provided supplemental responses to
3 the CID's document requests and interrogatories on September 24,
4 2018. Dkt. 44. The FTC informed the court that material responsive to
5 the CID was still missing and that Green had advised the FTC that the
6 remaining material was being compiled. Id.

7 On October 18, 2018, the parties filed a joint stipulation to
8 dismiss the CID enforcement action and on October 19, 2018, Judge
9 Otero ordered the action be dismissed without prejudice. Id. at Dkt.
10 45- 46.

11 The Court in FTC v. Jason Cardiff, et al., on October 9, 2020,
12 granted summary judgement on 16 different counts: 13 violations of
13 the FTCA, 15 U.S.C. § 53, and violations of the Restore Online
14 Shoppers' Confidence Act ("ROSCA"), 15 U.S.C. §§ 8401-05, the
15 Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. §§ 1693-1693r, and
16 the Telemarketing Sales Rule ("TSR"), 16 C.F.R. § 310.4(b)(1)(v).
17 Dkt. 511.

18 On March 1, 2022, the Court entered a permanent injunction
19 against Defendant, his wife, and all their related companies
20 prohibiting Defendant from continuing his fraudulent behavior. Id. at
21 Dkt. 705-706.

22 On January 31, 2023, a federal grand jury sitting in the Central
23 District of California returned and filed the Indictment against
24 Defendant, charging him with access device fraud in violation of 18
25 U.S.C. §§ 1029(a) Sections 5 and 2; aggravated identity theft in
26 violation of 18 U.S.C. §§ 1028A(a)(1)-(2); and two counts of witness
27 tampering in violation of 18 U.S.C. § 1512(b)(2)(B). Indictment, Dkt.
28 1.

1 **III. LEGAL STANDARDS**

2 **A. Rule 12(b) Motions**

3 Federal Rule of Criminal Procedure 12(b)(3) specifies that the
4 following defenses, objections, and requests must be raised in a
5 pretrial motion: (A) a defect in instituting the prosecution; (B) a
6 defect in the indictment or information; (C) suppression of evidence;
7 (D) severance of charges or defendants under Rule 14; and (E)
8 discovery under Rule 16. The basis for the motion must be reasonably
9 available and the motion must be determined without a trial on the
10 merits. Id. A permissible pretrial motion arguing a defect in the
11 indictment or information includes: (i) joining two or more offenses
12 in the same count; (ii) charging the same offense in more than one
13 count; (iii) lack of specificity; (iv) improper joinder; and (v)
14 failure to state an offense. Fed. R. Crim. P. 12(b)(3)(B).

15 In ruling on a pre-trial motion to dismiss counts in an
16 indictment for failure to state an offense, "the court is bound by
17 the four corners of the indictment." United States v. Boren, 278 F.3d
18 911, 914 (9th Cir. 2002) (citing United States v. Jensen, 93 F.3d
19 667, 669 (9th Cir. 1996); United States v. Caicedo, 47 F.3d 370, 371
20 (9th Cir. 1995); United States v. Buckley, 689 F.2d 893, 897 (9th
21 Cir. 1982); United States v. Thordarson, 646 F.2d 1323, 1337 n. 25
22 (9th Cir. 1981)). "[T]he court must accept the truth of the
23 allegations in the indictment" as the "indictment either states an
24 offense or it doesn't." Id. (internal citations removed). A motion to
25 dismiss the counts of an indictment "cannot be used as a device for
26 summary trial of the evidence." Id. (internal citations and
27 quotations removed).

1 "Most defenses. . . require factual determinations that the jury
2 should make, rendering pretrial disposition inappropriate." United
3 States v. Smith, 866 F.2d 1092, 1096 n.5 (9th Cir. 1989). The
4 district court may make preliminary findings of fact if necessary to
5 decide the questions of law presented "so long as the court's finding
6 on the motion do not invade the province of the ultimate finder of
7 fact." United States v. Shortt Accountancy Corp., 785 F.2d 1448, 1452
8 (9th Cir. 1986) (quoting United States v. Jones, 542 F.2d 661, 664
9 (6th Cir. 1976) (footnote omitted)). "The district court must decide
10 the issue raised in a pretrial motion before trial if it is entirely
11 segregable from the evidence to be presented at trial." Id. (quoting
12 United States v. Barletta, 644 F.2d 50, 57-58 (1st Cir. 1981). If the
13 pretrial claim is "substantially founded upon and intertwined with
14 evidence concerning the alleged offense, the motion falls within the
15 province of the ultimate finder of fact" and the jury must be allowed
16 to make such a finding. Id. (quoting United States v. Williams, 644
17 F.2d 950, 952-53 (2nd Cir. 1981). If the issue raised is not
18 "entirely segregable from the evidence presented at trial, but also
19 does not require review of a substantial portion of that evidence,"
20 discretion lies with the court to defer decision. Id. (citing
21 Barletta, 644 F.2d at 58).

22 A Rule 12(b) motion to dismiss, however, is not a proper way to
23 raise a factual defense. United States v. Nukida, 8F.3d 665, 669 (9th
24 Cir. 1993) (citing United States v. Smith, 866 F.2d 1092, 1096 n.3
25 (9th Cir. 1989) ("Rule 12(b) motions are appropriate to consider such
26 matters as former jeopardy, former conviction, former acquittal,
27 statute of limitations, immunity, and lack of jurisdiction," not a
28 factual defense) (internal quotations omitted); United States v.

1 Snyder, 428 F.2d 520, 522 (9th Cir. 1970), cert. denied, 400 U.S.
2 903, 27 L. Ed. 2d 139, 91 S. Ct. 139 (1970); see also United States
3 v. Schafer, 625 F.3d 629, 636 (9th Cir. 2010). If a "pretrial motion
4 raises factual questions associated with the validity of the defense,
5 the district court cannot make those determinations." Schafer, 625
6 F.3d at 636 (citing Shortt Accountancy Corp., 785 F.2d at 1452).

7 **B. The existence of a "nexus" between the obstructive act and**
8 **an official proceeding is a question of fact for the jury.**

9 Pursuant to the statute charged in Counts 3 and 4, 18 U.S.C. §
10 1512(b)(2)(B),

11 Whoever knowingly uses intimidation, threatens, or
12 corruptly persuades another person, or attempts to do
13 so, with intent to cause or induce any person to alter,
14 destroy mutilate, or conceal an object with intent to
impair the object's integrity or availability for use in
an official proceedings shall be fined under this title
or imprisoned not more than 20 years, or both.

15 There must be a "nexus" - the obstructive act must have a
16 relationship in time, causation, or logic - with the official
17 proceeding. United States v. Aguilar, 515 U.S. 593, 599-600 (1995);
18 Arthur Anderson LLP v. United States, 544 U.S. 696, 708 (2005). A
19 person lacking knowledge that his actions are likely to affect an
20 official proceeding lacks the requisite intent to obstruct. Aguilar,
21 515 U.S. at 599. A conviction, however, is proper if interference
22 with the official proceeding is the natural and probable effect of
23 the defendant's conduct. Id. An official proceeding need not be
24 pending or about to be instituted at the time of the offense.¹ 18
25 U.S.C. § 1512(f)(1).

26
27 ¹ Defendant's claim that the government must prove "that there
28 was an official proceeding pending at the time of the alleged
destruction of documents" is wrong and is exactly the opposite of
(footnote cont'd on next page)

1 While the Government must ultimately prove the existence of a
2 nexus as described in Aguilar and Andersen, it is a question of fact
3 for the jury, not the court in a pretrial motion. United States v.
4 Meza, No. 15CR3175 JM, 2017 WL 1371102, *4 (S.D. Cal. Apr. 7, 2017),
5 aff'd, 800 F. App'x 463 (9th Cir. 2020). The Supreme Court's "nexus"
6 requirement for certain obstruction statutes is a matter of proof,
7 rather than a pretrial pleading and should not be a basis for
8 dismissal of an obstruction count. United States v. Orrock, No.
9 216CR00111JADCWH, 2018 WL 7254703, *2 (D. Nev. Dec. 3, 2018), report
10 and recommendation adopted, No. 2:16-CR-0111-JAD-CWH, 2019 WL 187866
11 (D. Nev. Jan. 14, 2019) (citing United States v. Meza, 2017 WL 1371102
12 at *4-*5); see also United States v. Ring, 628 F. Supp. 2d 195, 224
13 (D.D.C. 2009) (holding that the nexus requirement is a jury question);
14 United States v. Moyer, 726 F. Supp. 2d 498, 510-11 (M.D. Pa. 2010)
15 (nexus is an element which must only be proven to the jury beyond a
16 reasonable doubt); United States v. Rand, No. 3:10-CR-182-RJC-DSC,
17 2011 WL 4498866, *3 (W.D.N.C. July 27, 2011), report and
18 recommendation adopted, No. 3:10-CR-182, 2011 WL 4498845 (W.D.N.C.
19 Sept. 27, 2011) ("Numerous courts have held that while the Government
20 must prove a nexus between the defendant's conduct and an official
21 proceeding at trial, the Indictment need not allege any such nexus.");
22 United States v. Black, 469 F. Supp. 2d 513, 543 (N.D. Ill. 2006) ("a
23 factual determination that the government cannot prove a nexus. . .
24 is a determination for the jury, not the Court"); United States v.
25 Triumph Capital Group, 260 F.Supp.2d 470, 475 (D. Conn. 2003)

26
27
28 what is written in the statute. Def. Mot. at 9:21-22 (internal
quotations omitted).

1 (government need not allege nexus in indictment; nexus need only be
2 established at trial).

3 A motion to dismiss focusing on a lack of nexus "essentially
4 requires the court to make a factual determination best left for a
5 jury, not the court." United States v. Brimager, No. 13-CR-02381 JM,
6 2014 WL 1515867, *5 (S.D. Cal. Apr. 17, 2014).

7 **IV. Argument**

8 **A. Defendant's Motion Should Be Denied**

9 Defendant has improperly used a Rule 12(b) motion to dismiss to
10 raise a factual defense to the charges in the Indictment that should
11 be left to the trial jury to decide. Specifically, Defendant argues
12 that Counts 3 and 4 should be dismissed because he does not believe
13 there was a nexus between his obstructive act and an official
14 proceeding. Def. Mot. at 3:18-22. Defendant fails to show, however,
15 any deficiency in the "four corners of the indictment." See Boren,
16 278 F.3d at 914.

17 A defendant is guilty of obstruction of justice if he:

18 knowingly uses intimidation, threatens, or corruptly
19 persuades another person, or attempts to do so, with
20 intent to cause or induce any person to alter, destroy
21 mutilate, or conceal an object with intent to impair the
22 object's integrity or availability for use in an official
23 proceeding.

24 18 U.S.C. § 1512(b)(2)(B). The Indictment charges:

25 Between in or about April 2018 and May 2018, in
26 Riverside County, within the Central District of
27 California, and elsewhere, defendant JASON EDWARD
28 THOMAS CARDIFF knowingly and corruptly persuaded
another person, namely [person] to cause and induce
[person] to alter, destroy, mutilate, and conceal an
object, namely, e-mails and electronic records, with
intent to impair the integrity and availability of the
objects for use in official proceedings, namely, civil

1 and administrative proceedings before the United States
2 District Court for the Central District of California
3 and the United States Federal Trade Commission.

4 See Dkt. 1.

5 Counts 3 and 4 of the Indictment track the language in 18 U.S.C.
6 § 1512 (b) (2) (B). Defendant instructed his employees to destroy
7 documents and records that the Court ordered him to produce in and
8 for official proceedings. As described in more detail below, there
9 were three different official proceedings that the Defendant
10 obstructed: (1) the FTC CID; (2) the FTC CID enforcement action in
11 this Court; and (3) the FTC lawsuit beginning with a temporary
12 restraining order and ending with a permanent injunction and a
13 summary judgement finding against Defendant, also in this Court.
14 Counts 3 and 4 of the Indictment properly state the offenses.
15 Defendant's argument as to the "nexus" of the obstructive act and the
16 official proceedings is a finding of fact for the jury to decide.

17 Accordingly, the Defendant's Motion to Dismiss Counts 3 and 4
18 should be denied.

19 **B. The CID, the enforcement proceeding regarding the CID, and**
20 **the FTC's lawsuit are all official proceedings.**

21 Even if this Court were to determine that Defendant's Rule 12(b)
22 motion to dismiss is a proper way to determine if the Indictment
23 sufficiently alleges that Defendant obstructed an official
24 proceeding, then the Motion to Dismiss Counts 3 and 4 should be
25 denied because the CID, the enforcement proceeding regarding the CID,
26 and the FTC's lawsuit are all official proceedings.
27
28

1 1. The CID itself was an official proceeding as it was
2 before a Federal Government agency which is authorized
3 by law.

4 Under 18 U.S.C § 1515(a) (1) (C), an "official proceeding"
5 includes "a proceeding before a Federal Government agency which is
6 authorized by law." 18 U.S.C § 1515(a) (1). In analyzing the meaning
7 of an "official proceeding," the Ninth Circuit has determined that
8 the term "proceeding" connotes some type of formal hearing. United
9 States v. Ermoian, 752 F.3d 1165, 1170 (9th Cir. 2013). The Court
10 also determined that the phrase "before a Federal Government agency"
11 suggested an appearance in front of the agency sitting as a tribunal;
12 it implies that an official proceeding involves some formal
13 convocation of the agency in which parties are directed to appear,
14 instead of any informal investigation conducted by any member of the
15 agency. Id. The Ninth Circuit also found the Fifth Circuit's
16 interpretation in United States v. Ramos to be compelling. Id. at
17 1171 n.5. Specifically, the Fifth Circuit found that "official
18 proceeding is consistently used throughout § 1512 in a manner that
19 contemplates a formal environment in which persons are called to
20 appear **or produce documents.**" United States v. Ramos, 537 F.3d 439,
21 463 (5th Cir. 2008) (internal quotations omitted) (emphasis added).
22 An "informal investigation, in its most preliminary stages is not an
official proceeding." Id.

23 Here, the CID issued by the FTC was a formal demand to produce
24 documents and answer interrogatories pursuant to the FTCA and signed
25 by FTC Commissioner Terrell McSweeney. Def. Mot. Ex. 1-1. Commissioner
26 McSweeney was one of five Commissioners nominated by the President and
27
28

1 confirmed by the Senate.² The CID specified two other individuals the
2 FTC designated as the Records Custodian and Deputy Records Custodian
3 for the specific matter concerning the Defendant and his company and
4 instructed Defendant and his company to produce the relevant material
5 to those individuals. Def. Mot. Ex. 1-1. The CID also listed an
6 attorney whom the FTC designated as Commission Counsel for the
7 matter. Id. The CID was accompanied by a cover letter and a
8 resolution, listing all five Commissioners, describing the nature and
9 scope of the investigation, both of which were signed by Donald
10 Clark, the Secretary of the FTC, and a CID Schedule detailing the
11 steps the Defendant and his company would need to take to comply with
12 the CID. Id. The entire CID package of documents totaled 18 pages
13 which included "22 interrogatories and 16 document requests," many of
14 which had subparts, illustrating that the FTC had already conducted a
15 considerable amount of investigation into the Defendant and his
16 company prior to issuing the CID. Def. Mot. at 9:9, Ex. 1-1.

17 A CID is essentially a subpoena. Seila Law LLC v. Consumer Fin.
18 Prot. Bureau, 591 U.S. 197, 197 (2020). An obstruction violation
19 occurs when the defendant orders the destruction or concealment of
20 documents he was ordered to produce. United States v. Rasheed, 663
21 F.2d 843, 853 (9th Cir. 1981); United States v. Erikson, 561 F.3d
22 1150, 159-160 (10th Cir. 2009); United States v. Quattrone, 441 F.3d
23 153, 170-71 (2d Cir. 2006). Defendant's company was also represented
24 by attorney Green at the time of the document destruction. The Court
25

26 ² Commissioners, Federal Trade Commission available at
27 <https://www.ftc.gov/about-ftc/commissioners-staff/commissioners> (last
28 visited Dec. 20, 2024). Each Commissioner serves a seven-year term
and no more than three Commissioners can be of the same political
party. Id. The President chooses one Commissioner to act as Chair.
Id.

1 may therefore infer that Defendant had knowledge of the importance of
2 turning over these documents and that destruction of these documents
3 was likely to affect the official proceeding because he was actively
4 represented by counsel. United States v. Cervantes, No. 16-10508,
5 2021 WL 2666684 (9th Cir. June 29, 2021).

6 The CID was an official proceeding, authorized by law, before a
7 Federal Government agency. After significant investigation by FTC
8 staff, the investigation was presented to one of five FTC
9 Commissioners, who reviewed the matter and signed the CID itself.
10 Def. Mot. Ex. 1-1. The 18-page CID package illustrated the complex
11 investigation that the FTC conducted prior to the issuance of the CID
12 and the CID itself formally demanded several specific documents,
13 answers to specific questions, and other material from the
14 Defendant's company. Instead, upon receiving the CID, Defendant knew
15 that he was compelled to produce documents that would incriminate him
16 so instructed his staff to destroy the responsive documents. Ex. 3,
17 ¶19.

18 Consequently, there was a nexus between Defendant's obstructive
19 acts and an official proceeding before the FTC.

20 2. The CID enforcement proceeding was also an official
21 proceeding before a judge in the United States
District Court for the Central District of California.

22 The plain language of 18 U.S.C. § 1515 (a) (1) (A) defines an
23 official proceeding to include "a proceeding before a judge or court
24 of the United States . . ."

25 On October 30, 2017, the FTC filed a Petition for an Order
26 Enforcing Civil Investigative Demand and a Memorandum of Points and
27 Authorities in support of the petition in this Court. FTC v. Redwood,
28 Dkts. 1-2. The case was assigned to Judge Percy Anderson first, then

1 transferred to Judge S. James Otero because the enforcement action
2 was related to another lawsuit filed in May of 2017 against Defendant
3 and his company.³ Dkt. 5.

4 By January 16, 2018, Defendant's company still had not produced
5 any documents responsive to the CID. Judge Otero entered an Order to
6 Show Cause, which was served on Redwood's attorney, Green. FTC v.
7 Redwood, Dkts. 12-13. To prevent being held in contempt, Defendant's
8 company stipulated with the FTC to have the Court enter an order
9 compelling compliance with the CID and vacating the show cause
10 hearing. Id. at Dkt. 16. Judge Otero then entered an Order Compelling
11 Compliance with the Civil Investigative Demand and Vacating Hearing
12 on January 25, 2018. Id. at Dkt. 17. Defendant's company was ordered
13 to, among other things:

14 comply fully with the Civil Investigative Demand (CID)
15 issued by the Federal Trade Commission on August 3, 2017,
16 and produce the information, documents, and tangible
17 items responsive to the CID on or before Friday, February
18 9, 2018.

17 Id.

18 Defendant's company, however, failed to comply with the court
19 order and he was personally served notice of another show cause
20 hearing. Id. at Dkt. 23-4. Shortly thereafter, Defendant instructed
21 his staff to use a list of search terms the FTC provided to withhold
22 and destroy documents he was compelled to produce. See Ex. 1 and 2;
23 see also Ex. 3 ¶19.

24 Counts 3 and 4 of the Indictment allege that Defendant
25 instructed his staff to destroy documents that were directly

26
27 ³ Some of the documents demanded by the CID related to the
28 claims alleged in this suit where Defendant made deceptive and false
claims regarding his products, including those related to the New
England Journal of Medicine conducting medical testing and endorsing
his products. Def. Mot. Ex. 1-1.

1 responsive to the CID and which, pursuant to the CID, his company was
2 required to produce to the FTC. These documents were physical and
3 tangible material subject to the court order unlike in Aguilar, where
4 the defendant was accused of withholding information from a field
5 agent that could potentially testify before a grand jury. Aguilar,
6 515 U.S., 600. The destruction of documents in this case was not
7 related to documents destroyed prior to the receipt of a legal demand
8 like in Anderson. Anderson, 544 U.S. at 702. Unlike Defendant, the
9 defendants in Anderson stopped destroying documents once they
10 received a legal demand for the documents. Id. Here, the Indictment
11 alleges that, months after receiving the FTC's CID and after the FTC
12 had filed an enforcement action in this Court seeking to enforce the
13 CID, Defendant ordered his employees to destroy documents that were
14 the subject of an official proceeding in this Court in which this
15 Court specifically ordered Defendant to produce responsive documents.

16 Therefore, there was a nexus between Defendant's obstructive
17 acts and an official proceeding before this Court.

18 3. The FTC's Ex Parte Application for a TRO began a third
19 foreseeable official proceeding.

20 Defendant admits that he had knowledge of an additional future
21 official proceeding when the CID notified him that the documents
22 demanded by the CID were to determine "[w]hether Commission action to
23 obtain monetary relief would be in the public interest." Def. Mot. at
24 4:24, Ex. 1-1 at 7. The CID also provided citations to specific
25 sections of the FTCA, "Sections 5 and 12 of the FTC Act, 15 U.S.C.
26 §§ 45 and 52." Id. Ex. 1-1 at 7. These statutes notified Defendant
27 that documents turned over in response to the CID that evidence
28 violations of the FTCA could result in the FTC filing a temporary

1 restraining order or preliminary injunction, which is exactly what
2 was done here. See 15 U.S.C. § 53(b).

3 Defendant's company was represented by Green within a month of
4 the CID being issued in August 2017. The Court may therefore assume
5 that Defendant had knowledge of the FTC's investigation and
6 litigation processes, the importance of turning over these documents,
7 and the possibility of future litigation if the documents evidenced
8 violations of the FTCA. United States v. Cervantes, No. 16-10508,
9 2021 WL 2666684 (9th Cir. June 29, 2021).

10 The FTC filed an enforcement action in October 2017, within two
11 months of issuing the CID, then received an Order Compelling
12 Compliance with the CID in January 2018, and thereafter, filed
13 multiple motions in the enforcement proceeding to force Defendant's
14 compliance with the CID and the Order. The Defendant spent over a
15 year defiantly avoiding compliance. In October 2018, the FTC filed a
16 lawsuit requesting a temporary restraining order, which resulted in a
17 permanent injunction in favor of the FTC.

18 Defendant's claim that the FTC lawsuit in October 2018 was not
19 foreseeable to him when he instructed his employees to destroy the
20 documents in April or May of 2018 is not credible. Def. Mot. at 9:17-
21 19. In addition to all of the other notice to Defendant of potential
22 litigation in the CID itself and in the litigation over the CID,
23 Defendant's act of ordering his employees to destroy documents
24 demanded by the CID and specifically connected to the search term
25 list provided by the FTC illustrated his knowledge that incriminating
26 documents could be used against him in the future official proceeding
27 described both in the CID itself and in the provisions of the FTCA
28 that the CID cited. Defendant instructed his employees to destroy the

1 documents so that they could not be used against him in the
2 foreseeable future litigation.

3 Thus, there was a nexus between Defendant's obstructive acts and
4 a foreseeable future official proceeding.

5 **III. CONCLUSION**

6 A Rule 12(b) motion to dismiss is not a proper way to raise a
7 factual defense. The government also presented three different
8 official proceedings that Defendant obstructed when he ordered his
9 employees to destroy documents legally demanded by the FTC. For the
10 foregoing reasons, the Court should deny Defendant's Motion to
11 Dismiss Counts 3 and 4 of the Indictment.